IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.906 OF 2004

Standard Chartered Bank ...Appellant

vs.

William Manuel Almeida & Ors. ...Respondents

Ms Nipa K. Pandye i/b M/s.Mahesh Menon & Co. for the Appellant
Mr.Manoj J. Bhatt for the Respondent

CORAM: A.S.OKA,J.
DATE : MARCH 18, 2005.

ORAL JUDGMENT:

1. On the last date the Appeal was heard finally and today it is kept for dictation of the Judgment.

2. This Appeal from Order is preferred by the original Defendant No.1 for challenging the impugned Judgment and Order passed on Application at Exh.5 made by the Respondent No.1-original Plaintiff. By the impugned order the Appellant and the Respondent Nos.2 and 3 have been restrained by an order of temporary injunction from implementing the suit notice and from causing obstruction to the possession of the Plaintiff over the suit flat till the disposal of the suit filed by the Respondent No.1 subject to condition that the Respondent No.1 will not create any third party interests in respect of the suit flat.

3. The Respondent No.1 filed a civil suit against the Appellant and Respondent Nos.2 and 3 for declaration that notice dated 12th May 2004 bearing No.2872 issued by the Respondent No.3 is null and void. Respondent No.1 claims to be the owner of residential premises described as C-002-D-001 admeasuring 3120 sq.ft. on fourth floor of C and D wing of the building known as Shivalik situated at Hermitage Lane, Hermitage complex near Maha Vishnu Mandir, Off Western Express Highway, on the land bearing Survey No.88/8, Mira Village, Mira Road, District Thane. The case of the Respondent No.1 is that one Tribhuvannath Kalpanath Sharma purchased the suit premises from M/s.Hermitage Constructions by agreement dated 12th July 2002 and was put in possession of the suit premises on 4th September 2002. The Respondent No.1 claims to have purchased the suit premises from the said Sharma with the consent of M/s.Hermitage Constructions and claims that he was put in possession of the suit premises. He has placed reliance on various documents executed in his favour by the said Sharma. The case of the Respondent No.1 is that he is a bonafide purchaser of the suit premises. His case is that when he visited the suit premises in the 1st week of July 2004 he noticed that notice dated 12th May 2003 issued by the Respondent No.3 was pasted on the door of the suit premises. In the said notice, there was a reference of order dated 25th March 2004 passed by the District Magistrate, Thane in favour of the Appellant herein against the said Sharma under Section 14 of Securitization & Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 (hereinafter referred to as the said Act of 2002). By the said order passed by the District Magistrate, the Respondent No.3 was authorised to take possession of the suit premises which was mortgaged in favour of the Appellant and which was the secured asset of the Appellant. The case of the Respondent No.1 is that he was a bonafide purchaser of the suit premises and he was not a party to the proceedings of Miscellaneous Application in which order dated 25th March 2004 was passed by the District Magistrate, Thane. He submitted that the order was not binding on the Respondent No.1 and therefore it cannot be enforced against the Respondent No.1.

3. The suit was contested by the Appellant by filing written statement. One of the main contentions raised by the Appellant is based on Section 34 of the said Act of 2002. The contention of the Appellant is that the jurisdiction of the Civil suit was ousted. The case of the Appellant is that the said Sharma approached the Appellant for housing loan for purchasing the suit premises and after considering his application, loan was granted in favour of the said Sharma. The case of the Appellant is that by executing a memorandum of Entry, equitable mortgage was created in respect of the suit premises by the said Sharma in favour of the Appellants. A reliance was placed on various provisions of the said Act of 2002 and it was submitted that remedy was available to the Appellant under the said Act of 2002.

4. The learned Trial Judge after holding that prima facie case was made out, passed order of temporary injunction which is challenged in this Appeal.

5. The learned Counsel for the Appellant placed reliance on the Judgment of the Apex Court reported in 2004 (5) All MR (S.C.) page No.484 (Mardia Chemicals Ltd. Vs. Union of India and others) and submitted that Civil court has no jurisdiction to entertain and try the suit. The learned Counsel further submitted that the suit premises was a secured asset of the Appellant. The learned Counsel pointed out that the Respondent No.1 cannot be a bonafide purchaser of the suit premises. It is pointed out that in the plaint, there is no allegation regarding fraud. The learned Counsel submitted that considering the provisions of the said Act of 2002, there was no prima facie case in favour of the Respondent No.1.

6. The learned Counsel for the Respondent No.1 submitted that discretionary order of temporary injunction has been passed by the Trial Court and no interference is permissible at this stage. He pointed out that original documents of title in respect of the suit premises were in the custody of the Respondent No.1. He submitted that as per the order of this Court dated 1st February 2005, inspection has been given by the Appellant of the alleged documents of title in respect of the suit premises in possession of the Appellant and in fact

the said documents of title are not genuine and therefore, there cannot be any equitable mortgage in favour of the Appellant. He submitted that an application for amendment of plaint has been filed by the Respondent No.1 in the Trial Court by which the Respondent No.1 is seeking to incorporate the averments relating to fraud. He, therefore, submitted no interference is called for.

7. I have considered the rival submissions. The Apex Court in case of Mardia Chemicals Ltd.(supra) has considered the relevant provisions of the said Act of 2002 and has held that only in very limited cases jurisdiction of the Civil Court can be invoked. Paragraph No.50 and 51 of the Judgment of the Apex court read thus:

> "50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr.Salve one of the counsel for respondents that there would no bar to approach the civil Court. Therefore, it

cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. **It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applied to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.**

51. **However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in case cases of English mortgages.** We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely Vs. Narasimhachariar (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in paragraph No.22:

> "The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of

> the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams Vs. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely..."

8. This suit is not by a mortgagor. The challenge in the suit is to the action under Section 13 (4) read with section 14 of the said Act of 2002. Therefore, the Respondent No.1 will have to prima facie show that the action of the secured creditor is fraudulent or his claim is so absurd which may not require any probe. If the averments made in the plaint are perused it is apparent that no case is made out that the action of the Appellant is fraudulent or that the claim of the Appellant is absurd and so untenable that does not require any probe. Apart from merely contending that he is a bonafide purchaser, the Respondent No.1 has not produced on record any

material to prove that he is a bonafide purchaser. Nothing is stated or placed on record to show that the Appellant made any enquiry before entering into the transaction with the said Sharma which any other prudent purchaser would have made. The finding of the learned Trial Judge in paragraph No.7 is that the Respondent No.1 is a bonafide purchaser is without any basis. The learned Trial Judge has not given any reason as to why he has come to such a prima facie conclusion.

9. As the plaint stands today, it is obvious that it does not fall in the exception recognised by the Apex Court in paragraph No.51 of its decision in case of Mardia Chemicals Ltd.(supra). Thus, as the plaint stands today, prima facie, civil court could not have entertained the suit filed by the Respondent No.1. If this is the position, it is obvious that the Trial Court could not have recorded a finding that Respondent No.1 has proved existence of prima facie case. Therefore, the impugned order is unsustainable and same deserves to be set aside.

10. Hence, I pass the following order :

i) The impugned Judgment and Order dated 8th September 2004 is quashed and set aside. Application made by the Respondent No.1 at Exh.5 stands dismissed with no order as to costs.

ii) If any application made by the Respondent No.1 for

amendment of plaint is pending, it will be decided by the learned Trial Judge on its own merits.

iii) The Appeal is allowed with no order as to costs.

11. At this stage, the learned Counsel for the Respondent No.1 prays that parties be directed to maintain status quo for a reasonable time and in the meanwhile, application for amendment of plaint be ordered to be decided. The said request is opposed by the learned Counsel for the Appellant. Since the order of injunction was operating from 8th September 2004, for a period of 2 weeks both the parties will maintain status quo as of today.

iv) Parties to act upon an authenticated copy of this order.

JUDGE.